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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOEL VELAZQUEZ, Defendant and Appellant.	B284387 (Los Angeles County Super. Ct. No. GA094662)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael Villalobos, Judge. Reversed.

Joy A. Maulitz, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

Joel Velazquez appeals the judgment entered following a jury trial in which he was convicted of voluntary manslaughter as a lesser included offense of murder. (Pen. Code,[1] § 192, subd. (a).) The trial court found the prior conviction allegations true and sentenced appellant to an aggregate term of 46 years to life.

Appellant correctly contends that the trial court prejudicially erred in failing to instruct on the applicable theories of involuntary manslaughter. We therefore reverse the judgment of conviction.[2]

FACTUAL BACKGROUND

During an argument on September 21, 2014, appellant's girlfriend, Alice Medina, died when appellant placed her in a chokehold.

Alice

Alice was born in 1967 and diagnosed with schizophrenia around age 14. When she took her medications, Alice was "normal," but "she was a different person" when she did not: she was paranoid, she heard voices, and she became violent. After her mother passed away in 1995, Alice stopped regularly taking her medications.

Appellant

Born in 1964, appellant suffered from seizures when he was two years old and had a learning disability. He was sexually abused several times as a child, starting when he was seven years

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[1] Undesignated statutory references are to the Penal Code.

[2] In light of this disposition, we need not address appellant's contentions on appeal regarding his sentence.

old. When appellant was 10 years old, he was abducted, stripped and forced to orally copulate the man who took him.

Appellant was in a serious motorcycle accident at age 14, which put him in a coma for over a month. In addition to suffering a traumatic brain injury, appellant lost his spleen and had to have a metal plate put in his face. He was never the same after the accident. He had trouble in school and often could not recall who people were. During high school, another boy hit appellant in the back of the head with a baseball bat, which caused him to vomit blood and bleed from his ears and nose. Appellant was hospitalized for up to four weeks with another traumatic brain injury. Despite all of this, appellant was on the wrestling team in high school and won some medals.

As an adult, appellant has lived with his mother for long periods of time because he cannot live on his own or hold a job. He has problems remembering the daily tasks of life and "a horrible time" learning new things, as well as difficulty focusing for very long. A clinical psychologist who examined appellant over nearly four hours and reviewed his medical records confirmed diagnoses of schizoaffective disorder, retardation, posttraumatic stress disorder (PTSD) and neurocognitive disorder. The psychologist opined that the PTSD arose from the incidents of sexual abuse appellant suffered as a boy and the serious head trauma from the motorcycle accident.

Appellant's medical records indicated he had been on and off psychotropic medications, including an antidepressant and an antipsychotic medication for paranoia and auditory hallucinations. In June 2014 appellant had sought treatment for symptoms of PTSD, including flashbacks, episodes of disassociation, and nightmares. He was severely depressed and

had made at least two, and probably four, serious suicide attempts.

Appellant's full skill IQ score was 63, placing him in the bottom 1 percent of the population and well into the range of intellectual disability. On the adaptive function test, which measures how well a person functions in daily life, appellant scored at the level of an eight-year-old child. His cognitive deficits cause him to be impulsive, and his abilities to reason, to make judgments and decisions, and to articulate his thinking are at the level of an eight-year-old.

Appellant Kills Alice

In September 2014, Alice and appellant were living together in a covered patio area between the garage and the house at Alice's father's home. The two had started going out after meeting at a homeless shelter about seven months earlier. Although they had a bed in their living space, they usually slept in Alice's car parked in the driveway. Alice was not allowed inside her father's house.

Theirs was a rocky relationship from the beginning. Alice frequently made false accusations against appellant and was physically violent, often punching and hitting him.[3] Appellant learned that whenever Alice started yelling at him, she was about to hit him. On one occasion, she hit him between the eyes with her fist, breaking his sunglasses. Other times she grabbed him and scratched him with her fingernails. Over the three days

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[3] At 64 inches tall and 130 pounds, appellant was smaller than Alice, who was 65 inches tall and weighed 180 pounds.

before the incident, Alice had been particularly abusive toward appellant.

On the morning of September 21, 2014, Alice started yelling at appellant from inside her car as he stood outside. She was angry, making various false accusations and saying things that did not make sense to appellant. Alice held up her fists and appellant thought she was going to hit him. Appellant got into the car, punched Alice on the side of her mouth, and grabbed her arms. Alice became even angrier, squirming and yelling at appellant to let her go. But appellant was afraid to release her for fear she would hit him. He placed Alice in a chokehold he had learned in high school wrestling to try to calm her down and make her stop yelling.

After a little while Alice became quiet and appellant felt her body go limp. He put his head to her chest, but could not hear a heartbeat. He slapped her, saying, "Come on, Alice. Wake up, wake up," and he checked her eyes to see if she was all right, hoping she was alive. He had tried only to calm her down and had not meant to kill her.

When appellant realized Alice was dead, he cut himself and wrote "I love y" on her stomach in blood. He also wrote a note which stated in part, "I'm so sorry, this went like this. . . . I didn't mean for this to go like this. I was only trying to shut her up because she was lying . . . about me saying I stuck two fingers in her eye," and, "I was just trying to shut her up." Appellant then laid down next to Alice in the car, hoping to die. Bleeding profusely, he passed out. He called his mother for help when he awakened.

When police arrived on the scene they found appellant lying on the ground in the covered patio area. Appellant raised his hands in the air as commanded and said, "I killed my girlfriend."

During an interview with police the next day, appellant said that he never intended to kill Alice, and he used the chokehold only to "shut her up."

DISCUSSION

The Trial Court Failed to Instruct Properly on Involuntary Manslaughter, and the Error Was Prejudicial

Appellant was charged with murder. At trial, the jury was instructed on the lesser included offense of voluntary manslaughter on the theories of heat of passion and unreasonable self-defense. The trial court also instructed on the lesser included offense of involuntary manslaughter on the theory of a lawful act committed in an unlawful manner.[4] Appellant argues that the court's instruction improperly omitted the unlawful act and inherently dangerous assaultive felony theories of involuntary manslaughter. Under those theories, the defendant committed involuntary manslaughter if he committed a crime—either a misdemeanor or an inherently dangerous assaultive felony—without malice but with criminal negligence, thereby causing the death of another person. (See § 192, subd. (b) [unlawful act not amounting to a felony]; *People v. Brothers* (2015) 236 Cal.App.4th 24, 33–34 (*Brothers*) [unlawful killing committed in course of inherently dangerous assaultive felony is involuntary manslaughter].) Appellant contends that because both of these

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[4] The jury was instructed: "The defendant committed involuntary manslaughter if: [¶] 1. The defendant committed a lawful act in an unlawful manner; [¶] 2. The defendant committed the act with criminal negligence; [¶] AND [¶] 3. The defendant's acts caused the death of another person."

theories were supported by the evidence in this case, the trial court had a sua sponte duty to instruct on them. He further maintains that the court's omission of these theories constituted prejudicial error requiring reversal.

Applying a de novo standard of review and considering the evidence in the light most favorable to appellant, we independently determine whether the trial court's instruction on the lesser included offense of involuntary manslaughter constituted a complete and correct statement of the law as applied to the facts of this case. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Castillo* (1997) 16 Cal.4th 1009, 1015; *Brothers*, *supra*, 236 Cal.App.4th at p. 30.)

A. *The trial court erred in failing to instruct fully on involuntary manslaughter*

1. Murder, manslaughter, and the mental states of implied malice and criminal negligence

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a); *People v. Bryant* (2013) 56 Cal.4th 959, 964 (*Bryant*).) Malice "may be either express or implied. It is express 'when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.' " (*People v. Chun* (2009) 45 Cal.4th 1172, 1181; § 188.) Our Supreme Court has " 'interpreted implied malice as having "both a physical and a mental component. The physical component is satisfied by the performance of 'an act, the natural consequences of which are dangerous to life.' [Citation.] The mental component is the requirement that the defendant 'knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life.' " ' " (*Bryant*, at p. 965.)

Voluntary and involuntary manslaughter are both lesser included offenses of murder. (*People v. Thomas* (2012) 53 Cal.4th

771, 813.) "When a homicide, committed with malice, is accomplished in the heat of passion or under the good faith but unreasonable belief that deadly force is required to defend oneself from imminent harm, the malice element is 'negated' or, as some have described, 'mitigated'; and the resulting crime is voluntary manslaughter." (*Brothers*, *supra*, 236 Cal.App.4th at p. 30; *Bryant*, *supra*, 56 Cal.4th at p. 968 ["We have often described both provocation and unreasonable self-defense as 'negating' the malice required for murder or as causing that malice to be 'disregarded' "]; *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*) ["[H]eat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by *negating the element of malice* that *otherwise inheres* in such a homicide"].)

Involuntary manslaughter lacks the element of malice altogether. (§ 192.) The offense is statutorily defined as " 'the unlawful killing of a human being without malice' during 'the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' " (*People v. Rangel* (2016) 62 Cal.4th 1192, 1227; § 192, subd. (b).) Our Supreme Court has broadly interpreted section 192 to include "an unintentional homicide committed in the course of a noninherently dangerous felony . . . committed without due caution and circumspection." (*People v. Burroughs* (1984) 35 Cal.3d 824, 835; *Brothers*, *supra*, 236 Cal.App.4th at p. 31.) And in *Brothers* our colleagues in Division Seven of this appellate district concluded that the necessary implication of our Supreme Court's decision in *Bryant* is that an unlawful killing committed without malice in the course of an inherently dangerous

assaultive felony is also involuntary manslaughter. (*Brothers*, at pp. 33–34; *Bryant*, *supra*, 56 Cal.4th at p. 970.)

The mental state required for any form of involuntary manslaughter is criminal negligence. (*People v. Mohamed* (2016) 247 Cal.App.4th 152, 161; *People v. Butler* (2010) 187 Cal.App.4th 998, 1007 (*Butler*); *People v. Evers* (1992) 10 Cal.App.4th 588, 596 (*Evers*) [the phrase "without due caution and circumspection" in § 192, subd. (b) refers "to criminal negligence—unintentional conduct which is gross or reckless, amounting to a disregard of human life or an indifference to the consequences"].) Thus, "[i]f a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence. By contrast where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice." (*Evers*, at p. 596; *People v. Guillen* (2014) 227 Cal.App.4th 934, 1027 (*Guillen*); (*People v. Luo* (2017) 16 Cal.App.5th 663, 670 ["Criminal negligence is also described in terms of objective foreseeability, that is, one acts with criminal negligence when a person 'of ordinary prudence would foresee that the act would cause a high degree of risk of death or great bodily harm' "].)

2. The trial court's duty to instruct on lesser included offenses

" 'California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense "necessarily included" in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the

evidence.' (*People v. Birks* (1998) 19 Cal.4th 108, 112.)" (*People v. Smith* (2013) 57 Cal.4th 232, 239 (*Smith*).) "A jury instructed on only the charged offense might be tempted to convict the defendant ' "of a greater offense than that established by the evidence" ' rather than acquit the defendant altogether, or it may be forced to acquit the defendant because the charged crime is not proven even though the ' "evidence is sufficient to establish a lesser included offense." ' ([*Breverman*, *supra*, 19 Cal.4th at p. 155].) Instructing the jury on lesser included offenses avoids presenting the jury with 'an "unwarranted all-or-nothing choice" ' (*ibid.*), thereby 'protect[ing] both the defendant and the prosecution against a verdict contrary to the evidence' (*id.* at p. 161)." (*People v. Eid* (2014) 59 Cal.4th 650, 657.)

"Thus, 'a trial court errs if it fails to instruct, sua sponte, on *all theories* of a lesser included offense which find substantial support in the evidence.' . . . (*Breverman*, *supra*, 19 Cal.4th at p. 162.)" (*Smith*, *supra*, 57 Cal.4th at p. 240, italics added.) " 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]" ' that the lesser offense, but not the greater, was committed." (*Breverman*, at p. 162; *People v. Sattiewhite* (2014) 59 Cal.4th 446, 477.) "In deciding whether evidence is 'substantial' in this context, a court determines only its bare legal sufficiency, not its weight." (*Breverman*, at p. 177; *People v. Moye* (2009) 47 Cal.4th 537, 556.)

The determination of the sufficiency of the evidence to support an instruction on a lesser included offense must be made without reference to the credibility of witnesses (*People v. Young* (2005) 34 Cal.4th 1149, 1200), and any doubt as to sufficiency should be resolved in favor of the defendant (*People v. Tufunga* (1999) 21 Cal.4th 935, 944). Finally, "the sua sponte duty to

instruct on lesser included offenses, unlike the duty to instruct on mere defenses, arises even against the defendant's wishes, and regardless of the trial theories or tactics the defendant has actually pursued. Hence, substantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself." (*Breverman*, *supra*, 19 Cal.4th at pp. 162–163.)

3. The trial court erred in failing to instruct the jury on the inherently dangerous assaultive felony and unlawful act theories of involuntary manslaughter

Our examination of the record in the present case reveals substantial evidence to support instruction on the inherently dangerous assaultive felony and unlawful act theories of involuntary manslaughter. (See *Brothers*, *supra*, 236 Cal.App.4th at p. 34 ["an instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony"].) There is no dispute in this case that Alice died as a result of the chokehold appellant used. And the chokehold, which certainly constituted at least a battery (§ 242 ["A battery is any willful and unlawful use of force or violence upon the person of another"]) or more likely, an aggravated assault (§ 245, subd. (a)(4)), plainly qualified as the unlawful act or inherently dangerous assaultive felony required for either of those theories of involuntary manslaughter.

We also find substantial evidence in the record that appellant may have acted with criminal negligence. There was evidence presented that appellant is mentally impaired and did not subjectively appreciate the risk the chokehold posed to Alice's life. Further, although there was conflicting evidence on the

point,[5] appellant told police and testified at trial that he was only trying to calm Alice down and make her shut up; he did not want to hurt her. Appellant insisted he never intended to kill Alice, and when he put her in the chokehold it did not occur to him he was putting her life in danger.

Respondent contends the trial court had no sua sponte duty to instruct on any theory of involuntary manslaughter because there was no substantial evidence that appellant killed without malice. In so arguing, respondent cites only evidence that would support a finding that appellant killed with malice, i.e., that he used a chokehold and made statements to police that indicated a subjective awareness that his conduct was dangerous to human life. But the existence of evidence that appellant might have acted with malice does not negate the substantial evidence of the absence of malice and has little bearing on the question of the trial court's duty to instruct. "[W]hen the evidence presents a material issue as to whether a killing was committed with malice, the court has a sua sponte duty to instruct on involuntary manslaughter as a lesser included offense, even when the killing occurs during the commission of an aggravated assault." (*Brothers*, *supra*, 236 Cal.App.4th at p. 35; see *Bryant*, *supra*, 56 Cal.4th at p. 970; see also *People v. Abilez* (2007) 41 Cal.4th 472,

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[5] Contrary evidence includes appellant's statements during his interview with police that his "abuse scars . . . made [him] react"; that he "grabbed her by the neck and . . . didn't let go, . . . it's better that . . . me and [Alice] both go to heaven than . . . to jail"; that he "got so frustrated by what was coming out of her mouth that . . . [he] grabbed her and . . . started struggling with her, . . . [and he] was so frustrated . . . [he] couldn't let her go."

515 [" '[i]f the evidence presents a material issue of whether a killing was committed without malice, and if there is substantial evidence the defendant committed involuntary manslaughter, failing to instruct on involuntary manslaughter would violate the defendant's constitutional right to have the jury determine every material issue' "].)

In *Brothers*, the appellate court found defendant had acted with implied malice when she "beat [the victim] repeatedly on the head and face with [a] large wooden broom handle with great force," and continued to beat him after tying him up and moving him to the garage. (*Brothers*, *supra*, 236 Cal.App.4th at pp. 28, 34.) She then left the scene only after one of her cohorts "had forced [a] large cloth gag down [the victim's] throat and [he] had stopped moving." (*Id*. at p. 34.) Under these circumstances, the Court of Appeal held the trial court had no sua sponte duty to instruct on involuntary manslaughter. The court reasoned that "there was simply no evidence from which a reasonable juror could entertain a reasonable doubt that Brothers had acted in conscious disregard of the risk her conduct posed to [the victim's] life. . . . There was no evidence of an accidental killing, gross negligence or Brothers's own lack of subjective understanding of the risk to [the victim's] life that her and her confederates' conduct posed." (*Ibid*.) Accordingly, "no material issue [was] presented as to whether the defendant subjectively appreciated the danger to human life . . . her conduct posed." (*Id*. at p. 35.)

Similarly, in *Guillen*, the appellate court found no error in the trial court's failure to instruct sua sponte on the lesser included offense of involuntary manslaughter. (*Guillen*, *supra*, 227 Cal.App.4th at p. 1028.) As in *Brothers*, the court found the record "devoid of evidence from which a reasonable jury could conclude appellants were guilty of involuntary manslaughter on

the theory they were criminally negligent. The evidence . . . demonstrate[d] each appellant committed an act endangering [the victim's] life, i.e., each appellant participated in the assault by hitting, kicking, or stomping [the victim]. Additionally, there was evidence each appellant realized the danger and acted in total disregard of that danger. . . . Based on the record before us, there is no question each appellant knew the risk involved to [the victim] when they violently attacked him." (*Id.* at pp. 1027–1028.)

Finally, in *Evers*, the court concluded the trial court had no duty to give an instruction on involuntary manslaughter where the defendant "intentionally used violent force against [the victim], knowing the probable consequences of his action." (*Evers*, *supra*, 10 Cal.App.4th at p. 598.) In so holding, the court stressed the complete lack of any evidence that defendant "was mentally or emotionally impaired so that he could not understand the risk he was causing to [the victim's] life." (*Id.* at p. 597.) Similarly, in *Brothers* and *Guillen*, the defendants were capable adults with no mental impairments, and both courts emphasized the absence of any evidence that the defendants lacked a subjective understanding of the risk to human life that their conduct posed. (*Brothers*, *supra*, 236 Cal.App.4th at pp. 34–35; *Guillen*, *supra*, 227 Cal.App.4th at p. 1028.)

The present case is different. Here, it is undisputed that appellant is mentally impaired. Unlike *Brothers*, *Guillen*, and *Evers*, appellant's severe mental deficits, together with his past experience using a chokehold in a nonlethal manner and evidence that he was not trying to hurt Alice and did not think she was going to die provide ample evidence he did not subjectively appreciate the risk his conduct posed to Alice's life. Therefore, although *Brothers*, *Guillen*, and *Evers* would dictate a different

result in the absence of evidence of appellant's severe mental impairment, we are compelled to conclude that the trial court in this case was required to instruct on the inherently dangerous assaultive felony and unlawful act theories of involuntary manslaughter.

B. *The error was prejudicial*

Our Supreme Court has held that "in a noncapital case, error in failing sua sponte to instruct, *or to instruct fully*, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under *Watson*.[6] A conviction of the charged offense may be reversed in consequence of this form of error only if, 'after an examination of the entire cause, including the evidence' (Cal. Const., art. VI, § 13), it appears 'reasonably probable' the defendant would have obtained a more favorable outcome had the error not occurred." (*Breverman*, *supra*, 19 Cal.4th at p. 178, italics added; *Watson*, *supra*, 46 Cal.2d at p. 836.) The high court has explained that " ' " ' "a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance,* more than an *abstract possibility*." ' " ' " (*People v. Sandoval* (2015) 62 Cal.4th 394, 422; *People v. Wilkins* (2013) 56 Cal.4th 333, 351.)

There appears to be "more than an abstract possibility" that the trial court's instructional error affected the verdict in this case. Although the jury received an instruction on involuntary manslaughter, that theory of culpability was available only if the jury found appellant had killed Alice in the course of doing a *lawful act* in an unlawful manner, a theory which plainly had no

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6 *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*).

application here. Because the jury was not instructed on the inherently dangerous assaultive felony or unlawful act theory of involuntary manslaughter, a conviction for voluntary manslaughter was the only option available to hold appellant responsible for his actions without finding him guilty of murder. Given the evidence of appellant's serious mental and intellectual disabilities, a conviction for involuntary manslaughter based on a finding that appellant committed a willful act "without intent to kill and without conscious disregard of the risk to human life" seems reasonably probable. (See CALCRIM No. 580; *Watson*, *supra*, 46 Cal.2d at p. 836.)

Citing our Supreme Court's discussion of the mental state required for voluntary manslaughter in *Bryant*, *supra*, 56 Cal.4th at pages 968–970, respondent asserts that any error must be deemed harmless because in finding appellant guilty of voluntary manslaughter, the jury necessarily found the killing was committed with implied malice. We disagree.

The issue before the court in *Bryant* was whether a killing without malice in the commission of an inherently dangerous assaultive felony may constitute voluntary manslaughter. Holding that no such theory of voluntary manslaughter exists, *Bryant* concluded that the trial court could not have erred in failing to instruct on the theory. (*Bryant*, *supra*, 56 Cal.4th at pp. 963, 970.) Contrary to respondent's assertion, *Bryant* did not hold that a finding of implied malice may be inferred from a jury's conviction for voluntary manslaughter.

Here, in convicting appellant of voluntary manslaughter, the jury was not required to find malice, and there is no basis for presuming the jury actually made such a finding based on the instructions and the verdict. (See *People v. Elmore* (2014) 59 Cal.4th 121, 133 [in order to reduce a murder to voluntary

manslaughter, the jury must determine whether the defendant acted under heat of passion or in unreasonable self-defense, both of which operate by precluding the formation of malice].)

Because there exists a reasonable probability of a more favorable outcome for appellant in the absence of the error, we conclude the trial court's failure to instruct on all applicable theories of involuntary manslaughter was not harmless.

DISPOSITION

The judgment is reversed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.